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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 981

A. B. FRANK COMPANY,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS OF THE UNITED STATES

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159736



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**PETITION FOR WRIT OF CERTIORARI TO THE
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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, A. B. Frank Company, prays that a writ of certiorari be issued to review the judgment of the Court of Claims of the United States against the petitioner and in favor of the United States, entered November 5, 1945 (R. 25), motion for new trial denied February 4, 1946 (R. 25).

The certified transcript of the record is furnished herewith in accordance with Rule 41 of the rules of this Court.

Jurisdiction

The jurisdiction of this Court is invoked under the Act of February 13, 1925, c. 229, Section 3, 43 Stat. 939, as amended May 22, 1939, 53 Stat. 752, 28 U. S. C. 288 (b).

Summary Statement of the Matter Involved

The petitioner, engaged in the business of selling dry goods, filed its floor-stocks tax return on P. T. Form 32, under Section 16 (a) (1) of the Agricultural Adjustment Act of May 12, 1933, 48 Stat. 31, and paid the tax in the amount of \$36,735.16.

On April 10, 1939, the petitioner filed its claim for the refund of the tax paid. The claim was made on printed P. T. Form 76, prepared by the Commissioner of Internal Revenue pursuant to Title VII of the Revenue Act of 1936 and Regulations 96. The grounds of the claim were adequately stated and the petitioner made the following, among other, statements of fact submitted as evidence to the Commissioner: (1) That it bore the burden of the tax;¹ and (2) That information in the claim was taken from its books. The claim was under oath as required by Section 903 of the Revenue Act of 1936, 49 Stat. 1747.²

After the claim had been filed and by letter dated May 13,

¹ The court below found that, while it purported to have been filed in accordance with the requirements in Section 902, "the claim set out in the five printed grounds thereof to be sworn to by the taxpayer the types of evidence permissible under Section 907 of the Revenue Act of 1936 which prescribed a type of evidence in the nature of average margin of profit computations in order to substantiate a claim for the refund of processing taxes".

² Section 903 is entitled "Filing of Claims". The section is:

No refund shall be made or allowed of any amount paid by or collected from any person as tax under this chapter unless, after June 22, 1936, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under this chapter, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

1939, the Commissioner of Internal Revenue advised the petitioner that information submitted with the claim for refund did not afford a sufficient basis for him to determine whether and to what extent the burden of the floor-stocks tax had been borne by the petitioner and requested a statement showing prices charged before and after the effective date together with certain other information in detail (R. 13).

In the printed instructions on P. T. Form 76, the petitioner was required to set forth each ground for refund and "the facts of his claim", but was privileged to prove these facts in any manner available. The petitioner was also advised, as provided in Section 902 of the Act, 49 Stat. 1746, that it might establish that it bore the burden of the tax to the satisfaction of the Commissioner or to the satisfaction of the trial court. The petitioner chose the latter course and submitted no further evidence in substantiation of its claim to the Commissioner.

The petitioner filed its petition in the Court of Claims to invoke jurisdiction under Section 145 of the Judicial Code, 28 U. S. C. 250, 36 Stat. 1136. The petitioner proceeded to offer evidence to prove the grounds of its claim for refund of the floor-stocks tax from its books, records, audit schedules, invoices and other data showing the prices prevailing both before and after August 1, 1933, and by the testimony of witnesses (R. 14).

Thereafter and on April 22, 1944, after the case was closed against further testimony, the United States filed its plea in bar alleging that the petitioner had no right of action because the evidence offered in the Court of Claims had not been submitted to the Commissioner of Internal Revenue.³

³ The actual allegation in the plea is:

* * * the plaintiff has no right of action against the United States because no evidence was ever submitted in support of any claim

The court below entered its order sustaining the plea in bar and dismissing the petition.

The Statutes

Following the decision of this Court in *United States v. Butler, et al., Receivers*, 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477, the Congress, in the Revenue Act of 1936, placed certain restrictions on the right of a taxpayer to recover the floor-stocks tax that had been illegally collected from him. In the court below and here the petitioner relies on the provision in Section 902, 7 U. S. C. 644, 49 Stat. 1746, that it may establish to the Commissioner or to the trial court that it bore the burden of the amount of the tax and has not been relieved thereof nor imburshed therefor nor shifted such burden. The provision is:

* * * to the satisfaction of the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under Section 906, as the case may be * * *.⁴

for refund, as expressly required by the applicable provisions of Section 903 of the Revenue Act of 1936, c. 690, 49 Stat. 1747, reading in part: "All evidence relied upon in support of such claim shall be clearly set forth under oath" (R. 3).

⁴ Section 902 is as follows:

Conditions on allowance of refunds:

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under this chapter, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 648 of this title, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, * * * or

(b) That he has repaid unconditionally such amount to his vendee * * *.

The provisions in Section 903, amended June 29, 1939, 7 U. S. C. 645, 53 Stat. 884, entitled "Filing of claims", required that claims be filed in accordance with regulations prescribed by the Commissioner, with the approval of the Secretary. The section contains the following with respect to evidence submitted to the Commissioner:

All evidence relied upon in support of such claim shall be clearly set forth under oath.

In Section 916, 7 U. S. C. 658, 49 Stat. 1755, entitled "Rules and regulations", the Congress made the usual provisions with respect to regulations to cover the refund of floor-stocks tax. The section reads:

The Commissioner shall, with the approval of the Secretary, prescribe such rules and regulations as may be deemed necessary to carry out the provisions of this title.

The Regulations and Instructions to Taxpayers

The Commissioner of Internal Revenue promulgated Regulations 96 for the enforcement of Title VII of the Revenue Act of 1936. Article 202 thereof, entitled "Facts and evidence in support of claim", provides that each ground of the claim shall be set forth under oath and that it is incumbent upon the claimant to substantiate the claim by clear and convincing evidence of "all facts necessary to establish his claim to the satisfaction of the Commissioner", failure to do so would result in disallowance.⁵

⁵ The article provides:

Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

There are in the article the further provisions:

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.⁶

The claim for refund was filed on printed P. T. Form 76, on which the full content of Section 902 of the Revenue Act of 1936 was printed and in the instructions thereon the petitioner was advised that no refund would be allowed unless it established to the satisfaction of the Commissioner, or to the satisfaction of the trial court that it bore the burden of the tax.⁷

The Questions Presented

1. The meaning of the provision in Section 902 of the Revenue Act of 1936 that the petitioner may establish that it bore the burden of the tax "to the satisfaction of the Commissioner of Internal Revenue * * * or to the satisfaction of the trial court * * *."⁸

2. Can the Court of Claims elect to take or refuse jurisdiction, conferred by Section 145 of the Judicial Code and by Section 902 of the Revenue Act of 1936, of a claim for the refund of an overpayment of floor-stocks tax, merely because all evidence was or was not submitted to the Com-

⁶ The above regulation does not materially differ from the provision in regulations with respect to income tax. The provision in Section 19.322-3 of Regulations 103 and 111 is:

The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof.

⁷ The instructions further set forth in Section 7 of P. T. Form 76, entitled "Facts and Evidence", the provisions of Article 202 of the regulations.

⁸ Does not the petitioner, under Section 902, have the right to establish its case to the Commissioner or to the trial court?

missioner of Internal Revenue as the basis of the administrative allowance or disallowance of the claim?⁹

3. In a suit in the Court of Claims to recover floor-stocks tax paid under the Agricultural Adjustment Act of May 12, 1933, 48 Stat. 31, is the petitioner restricted to the submission of the same evidence that previously had been submitted to the Commissioner of Internal Revenue?¹⁰

The question relates to the introduction of proof to substantiate the grounds of the claim and the "specific facts" required to be stated in the claim¹¹ to apprise the Commissioner of the exact basis thereof. The petitioner concedes, of course, that it was required to file a complete claim and make the necessary statements of specific fact, later to be proven; but the petitioner contends that it is entitled to submit evidence in support of the stated facts and to make a record in the Court of Claims.

If the Revenue Act of 1936 is to be construed to restrict the petitioner to the submission of the same evidence to the Court of Claims, has not the petitioner been denied its day in court?¹²

⁹ In *Samara v. United States*, 129 F. 2d 594, the Court of Appeals for the Second Circuit held that the district court erred in refusing to entertain jurisdiction because it found evidence was not submitted to the Commissioner of Internal Revenue.

¹⁰ The court below stated the question, is the petitioner "entitled in this proceeding to submit evidence in support of and to substantiate its claimed refund, which evidence was not submitted to the Commissioner of Internal Revenue in connection with and in support of any refund claim filed with and decided adversely to plaintiff by the Commissioner."

¹¹ The requirement in Article 202 of Regulations 96 is "that certain specific facts shall be stated in support of any claim for refund". There follows the statement that the taxpayer is privileged to prove these facts in any manner available to him.

¹² Has not the petitioner been denied "the privilege of introducing evidence" stated as a right in *Anniston Manufacturing Company v. Davis*, 301 U. S. 337, 57 S. Ct. 816, 81 L. Ed. 1143?

Reasons for Allowance of the Writ

PRELIMINARY STATEMENT

In order that the questions presented and the reasons for the allowance may be concisely stated and may not be read to go beyond their intended scope, the petitioner concedes that it was required to state the grounds of its claim for refund and, further, that it was required to state to the Commissioner of Internal Revenue such facts as were necessary to inform him of the nature and grounds of the claim. These facts have been designated by the Commissioner in his regulations as "certain specific facts." Having done this,¹³ the petitioner contends that it has the right to go into the court and prove the grounds of its claim and substantiate the facts alleged, by any and all evidence and proof available to it¹⁴ "to the satisfaction of the trial court" as Section 902 of the Revenue Act of 1936 expressly provides.

At the time of filing the claim for refund and when the Commissioner requested further proof as a prerequisite to his allowance of the claim, the petitioner had before it the Revenue Act of 1936, Regulations 96, and the instructions on the claim for refund. Relying on the statute, the regulations and the instructions, the petitioner then believed that it might furnish evidence to the Commissioner of Internal Revenue and have its claim allowed administratively by the Commissioner or permit the claim to be disallowed by that official and then bring suit and submit the necessary evidence to the "trial court". The petitioner chose the latter

¹³ In order to prevail, the petitioner must, of course, prove this, but was given no opportunity to do so in the court below. The case was heard merely on the question of the requirement of submission of evidence to the Commissioner.

¹⁴ Article 202 of Regulations 96.

procedure, believing it is entitled to the benefit of the provision in Section 902 that it might establish its case to the satisfaction of the trial court.

The Court of Claims is a court of record and its trials are *de novo*. No evidence presented to the Commissioner can be transferred, as such, to the court. The litigant must present his books, other document and witnesses and there make his record. The Court of Claims is not a court of review and does not sit to review the decisions of administrative officials.

THE DECISION BELOW IS IN CONFLICT WITH THE STATUTE AND
REGULATIONS

The Court of Claims has refused to take jurisdiction clearly conferred by the Congress and has denied the petitioner the right to establish the fact that it bore the burden of the tax "to the satisfaction of the trial court" as expressly provided by the Congress.

The Congress has provided in Section 902 of the Revenue Act of 1936 that the petitioner may establish that it bore the burden of the tax to the satisfaction of the Commissioner of Internal Revenue or to the satisfaction of the trial court. The clauses designating the administrative official and the trial court, to whose satisfaction the essential fact may be established, are connected by the word "or" and not by the word "and". The section should be construed to mean that the essential fact may be established to the satisfaction of either the administrative official or the trial court.

The legislative history clearly discloses that the Congress meant, as stated in the report of the Committee on Finance of the Senate, that the claim may be "acted on by the Commissioner or such courts". The sentence in which

these quoted words appear is introduced by the word "whether".¹⁵ The committee contemplated the establishment of the facts either to the Commissioner or to the trial court. The Ways and Means Committee reported¹⁶ that "The bill proposes that such claims (floor-stocks tax) shall be handled in the same manner as any other claims for refund under existing law." The manner in which claims for the refund of taxes were being handled under the then existing law had been settled by decisions of this Court, under which a taxpayer had the right to sue, following the disallowance of his claim, and then to submit evidence in support of the claim to the trial court in a trial *de novo*.¹⁷ This right was clearly deprived the petitioner by the court below.

The Ways and Means Committee further reported: "The claimant will merely present his claim to the Bureau of Internal Revenue and it will be passed on without formal

¹⁵ In Senate Report 2156, 74th Congress, 2d Session, the Committee on Finance stated:

The reference to the trial court is necessary, since in all cases where the claimant is dissatisfied with the determination of the Commissioner
 * * * the claimant will have recourse to the district courts or the Court of Claims. Whether the claim is acted on by the Commissioner or such courts, the burden of proving that the tax was not passed on will be on the claimant.

¹⁶ House Report 12395, 74th Congress, 2d Session.

¹⁷ The provision in Section 3226 of the Revised Statutes, as amended by Act of June 6, 1932, 47 Stat. 286, then in force, was:

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

This Court had decided *Tucker v. Alexander*, 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253, and *United States v. Felt and Tarrant Mfg. Co.*, 283 U. S. 269, 51 S. Ct. 376, 75 L. Ed. 1025. It is considered unnecessary to refer to further decisions.

hearing. If the claimant is dissatisfied with the Commissioner's decision, he will then have recourse to the district court or the Court of Claims."

The petitioner submits that the decision of the court below is in direct conflict with the provision of Section 902 of the Revenue Act of 1936 that it might establish that it bore the burden of the tax "to the satisfaction of the Commissioner of Internal Revenue in accordance with regulations * * * or to the satisfaction of the trial court". In the clearest possible language, the Congress has provided that the taxpayer, in order to obtain the refund, may satisfy either the Commissioner of Internal Revenue or the trial court. The words "to the satisfaction" are repeated and the phrases introduced by them are connected by the word "or" which imports or makes unnecessary the use of the word "either". The legislative history fully supports the position of the petitioner that the Congress intended that it might prove its case either to the Commissioner or to the trial court.

The decision is likewise in conflict with the regulations and with the instructions printed on the claim form. In the regulations, the petitioner was advised that, if it furnished no evidence to the Commissioner of Internal Revenue, its claim would be disallowed by that official. The petitioner was not advised that it could not sue. On the contrary, the clear meaning of the regulations is that the disallowance of the claim is a mere prerequisite to suit, not a bar to the right to sue, as the court below decided.

In the instructions printed on P. T. Form 76, the petitioner was told that it might establish that it bore the burden of the tax to the satisfaction of the Commissioner of Internal Revenue or to the satisfaction of the trial court. The instructions followed the statute, Section 902, and the regulations, Article 202.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF
THIS COURT

The decision below is in direct conflict with the decision in *Jefferson Electric Manufacturing Company v. United States*, 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859, in which this Court had before it the provisions of Section 424, the Revenue Act of 1928, 45 Stat. 866, with reference to the refund of the tax on automobile accessories. The section of the Revenue Act of 1928 there before this Court was in substance the same as Section 902 of the Revenue Act of 1936. The Revenue Act of 1928 provided that no refund should be made, unless pursuant to a judgment of a court or unless the taxpayer "established to the satisfaction of the Commissioner" that he was entitled to a refund. The authority of the trial court to entertain the suit was challenged on the ground that the taxpayer had not established "to the satisfaction of the Commissioner" that it had borne the burden of the tax as required by Section 424(a)(2) of the Revenue Act of 1928 as the basis of administrative refund. This Court held that the requirement that the taxpayer establish to the satisfaction of the Commissioner that he bore the burden of the tax neither cut off the right of the taxpayer to sue, after applying unsuccessfully to the Commissioner, nor abrogated the authority of the trial court to entertain the suit.

The decision was followed in *Anniston Manufacturing Company v. Davis*, 301 U. S. 337, 57 S. Ct. 816, 81 L. Ed. 1143, and given application to the Revenue Act of 1936. There Chief Justice Hughes repeated the principle:

The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it.

There is no material difference between the provisions of Section 424(a)(2) of the Revenue Act of 1928 and the pro-

visions of Section 902 of the Revenue Act of 1936. Similar restrictions are placed on the refund of the tax by the two acts. The taxpayer was required to prove to the Commissioner or to the trial court that he bore the burden of the tax in the 1928 Act as well as in the 1936 Act.

The petitioner submits that the decision below conflicts with the decision of this Court in the *Jefferson Electric Manufacturing Company* case, decided under the Revenue Act of 1928, having like provisions to those of Section 902 of the Revenue Act of 1936. The 1936 Act was, in fact, modeled after that of 1928, the dominant purpose of each being that the taxpayer establish that he bore the burden of the tax, not that he could not sue.

The Revenue Act of 1936 was before this Court in the *Anniston Manufacturing Company* case and the questions here presented, the right of the petitioner to introduce evidence and the duty of the trial court to decide the case in accordance with the evidence, were considered and decided favorably to the taxpayer. The holding of the court below is in direct conflict with the decision of this Court in the *Anniston* case. For that reason alone the petitioner submits that the writ should be granted.

The petitioner further submits that the questions here presented are of equal importance to those before this Court in the *Jefferson Electric Manufacturing Company* and *Anniston Manufacturing Company* cases.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF
SEVERAL OF THE CIRCUIT COURTS OF APPEALS

The decision below is in conflict with the decision in *Bethlehem Baking Company v. United States*, 3 Cir., 129 F. 2d 490, and other cases grouped with it by the court below at page 24 of the record. In *Louis F. Hall and Company, Inc. v. United States*, 2 Cir., 148 F. 2d 274, cert. denied, No. 167,

1945, 66 S. Ct. 35, Judge Chase, in clear recognition of conflict in decision among the circuit courts of appeals, stated:

We decline, with deference, to subscribe to the reasoning and result in *Bethlehem Baking Co. v. United States*, 3 Cir., 129 F. (2) 490.

In the application for the writ by Louis F. Hall and Company, Inc., the questions presented were stated as:

1. Do Sections 902 and 903 of the Revenue Act of 1936, and the provisions of Regulations 96 require that evidence be submitted to the Commissioner in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933 (48 Stat. 31)?

2. Is the rule in the *Samara* case the correct rule to be followed in actions for refund of taxes paid under said Act?

In the *Louis F. Hall and Company, Inc.*, case, the issue was the sufficiency of the claim for refund. There the United States moved to dismiss the complaint for failure to state a claim for refund on which relief could be granted. The motion was sustained. Here the issue is not the sufficiency of the claim, but the right to present evidence and make a record in the Court of Claims. The United States filed its plea in bar "because no evidence was ever submitted in support of any claim for refund" to the Commissioner. On that issue, the decision below was made. The sufficiency of the claim for refund was never questioned. The decision in the *Hall* case was by the same court, Second Circuit, that decided *Samara v. United States*, 2 Cir., 129 F. 2d 594, in which the United States moved to dismiss "on the ground that the court lacked jurisdiction because of the insufficiency of the claim for refund." The trial court sustained the motion as to jurisdiction and was re-

versed on appeal. On the issue of jurisdiction, the decision in the *Samara* case was in favor of the taxpayer.¹⁸

THE QUESTION IS ONE OF IMPORTANCE

The primary question here presented, the right of a taxpayer who has filed a claim for refund in compliance with Section 903 of the Revenue Act of 1936 and Article 202 of Regulations 96,¹⁹ to establish that it has borne the burden of the tax to the satisfaction of the trial court, is certainly one of sufficient importance to justify the granting of the writ.

Aside from the fact that a particular group of taxpayers is directly affected,²⁰ important and far-reaching questions of jurisdiction and of procedure are involved, which may concern any claimant against the United States who seeks

¹⁸ In the court below, the petitioner proceeded to attempt to prove its case, as stated at page 14 of the record, by the introduction of its books and the testimony of witnesses at a hearing before a commissioner of the court and it was after such hearing and submission of evidence that the plea in bar was filed to claim that the petitioner was not entitled to submit evidence not submitted to the Commissioner of Internal Revenue. On that issue alone the case was submitted to the court below (R. 3). However, instead of deciding what evidence, if any, should have been excluded because not submitted to the Commissioner, and what evidence was in fact submitted to the Commissioner and admissible in court, under the issue as decided, the court below dismissed the petition, thereby refusing jurisdiction, contrary to the decision of this Court in *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 57 S. Ct. 816, 81 L. Ed. 1143, and of the Second Circuit in *Samara v. United States*, 129 F. 2d 594, in which Judge Swan stated:

This is not to say that the taxpayer cannot get a fresh decision on any disputed fact which was submitted—he may call the witnesses whose statements he set forth in his claim for refund—but he cannot use facts which he failed to disclose; that is, he must not withhold part of his ammunition until the trial.

¹⁹ The sufficiency of the claim was never questioned. The plea in bar, coming after the taking of testimony, was in the nature of an objection to the admission of evidence and served such purpose.

²⁰ This was developed in the application in *Louis P. Hall and Company, Inc., v. United States*, cert. denied, 66 S. Ct. 35.

to sue on a claim required to be filed with an administrative officer.

The principle that is the basis of the decision below is to be found in the comment of Judge Swan in *Samara v. United States*, 2 Cir., 129 F. 2d 594, that "The court proceeding is intended only as a review of the Commissioner's decision." The Congress has not so provided and the petitioner submits the principle should not, without the approval of this Court, be given the force of law to deprive the trial court of jurisdiction and the taxpayer of his right to establish there his claim in a trial *de novo*.

The effect of the decision below is to establish the Commissioner of Internal Revenue as a fact-finding authority or administrative tribunal similar to the Securities and Exchange Commission, the Federal Power Commission and like boards and commissions with authority to make and transmit records of findings of fact. The decision is a serious departure from the long-established rule.

Conclusion

The petitioner submits that in its claim for refund it complied with the requirement that it state facts to apprise the Commissioner of its claim. The petitioner now seeks to prove those facts from its books and by the testimony of witnesses. That right and not the mere sufficiency of the claim for refund is the issue. The concluding statement of the court below is:

The plaintiff having failed and refused to submit any evidence to the Commissioner in support of its claim for refund is now barred from submitting in court the evidence which was available and which could and should as readily have been offered to the Commissioner.²¹

²¹ See footnote 13, and preliminary statement.

How can a taxpayer present evidence to the Commissioner? The answer is, he can not, for the simple reason that he is not afforded that opportunity. He can not come in with his books and witnesses and make a record as he can in court. All the taxpayer can do is state the grounds of his claim and such facts as are necessary to explain those grounds and then request the Commissioner to make an examination of his records. The hearings before the Commissioner are informal and are not recorded in such manner that a record or finding can be transmitted to the trial court. The Congress understood this. In reporting the revenue Act of 1936, the Ways and Means Committee stated:²²

The claimant will merely present his claim to the Bureau of Internal Revenue and it will be passed on without formal hearing. If the claimant is dissatisfied with the Commissioner's decision he will then have recourse to the District Court or the Court of Claims.

To hold that a taxpayer, in a suit against the United States, is restricted to the introduction of the same evidence that he submitted to the Commissioner at an informal hearing, not recorded, certainly deprives such taxpayer of his right, under Section 902 of the Revenue Act of 1936, to establish to the satisfaction of the trial court that he bore the burden of the tax and is entitled to its refund.

This Court should grant this petitioner's right in order to decide whether "The court proceeding is intended only as a review of the Commissioner's decision". The question here presented is not the same as in *Louis F. Hall and Company, Inc., v. United States*, the mere sufficiency of the claim for refund, and the denial of the writ in that case should not be held a precedent here.

²² House Report No. 12395, 74th Congress, 2d Session.

The petitioner submits that the question here presented is of public importance, concerns the meaning of an act of Congress and, not having been directly before this Court, should be considered and passed on by this Court and, for that purpose, the petitioner prays that its application be granted.

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MAY 17 1946

CHARLES ELMORE DROPLEY
CLERK

No. 981

In the Supreme Court of the United States

OCTOBER TERM, 1945

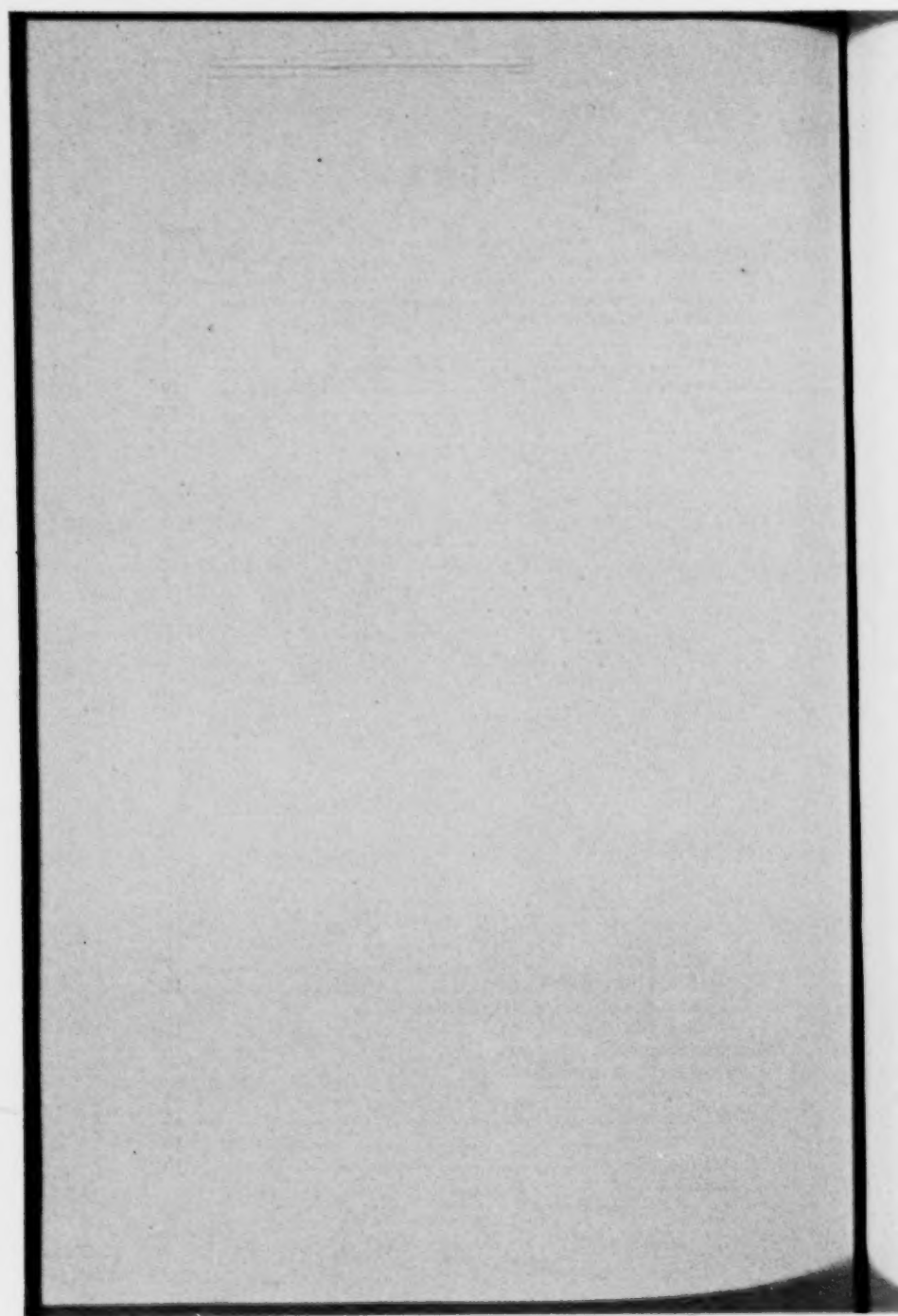
A. B. FRANK COMPANY, PETITIONER

v.

THE UNITED STATES

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS**

BRIEF FOR THE UNITED STATES IN OPPOSITION



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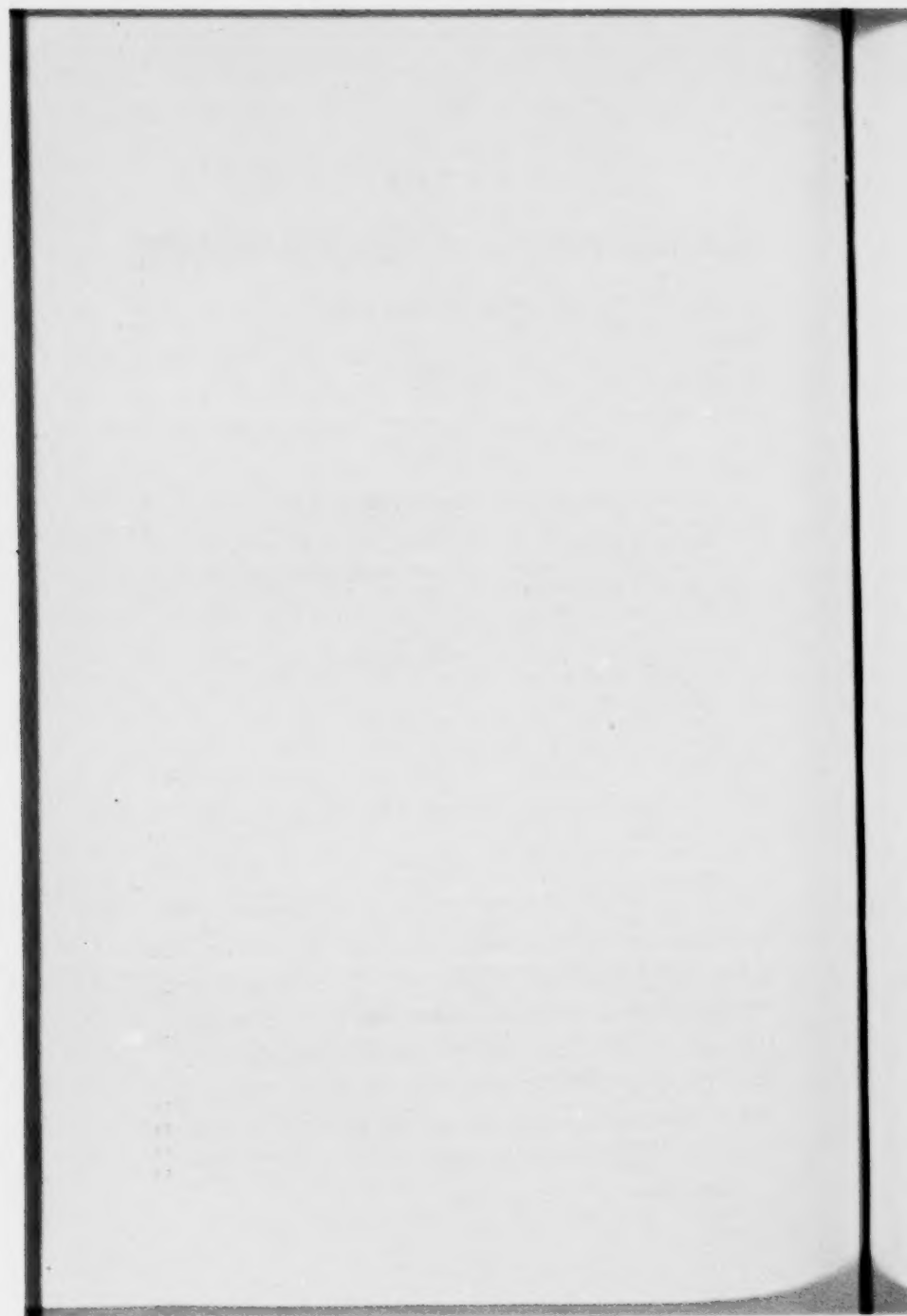
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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 981

A. B. FRANK COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 16-25) is reported in 62 F. Supp. 860.

JURISDICTION

The judgment of the Court of Claims was entered on November 5, 1945 (R. 25). A motion for a new trial was filed on January 3, 1946, and was overruled on February 4, 1946 (R. 25). The petition for a writ of certiorari was filed on March 21, 1946 (R. 25). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Where taxpayer filed a claim for refund of floor stocks taxes but failed and refused to submit any substantial evidence upon which the Commissioner could determine whether or not it bore the burden of the tax, may the taxpayer maintain a suit in the Court of Claims for the recovery of such tax?

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations are set forth in the Appendix, *infra*, pp. 10-15.

STATEMENT

This is a suit to recover \$36,735.16, paid as floor stocks tax during 1933, pursuant to the provisions of the Agricultural Adjustment Act of May 12, 1933, the taxing provisions of which were held unconstitutional in *United States v. Butler*, 297 U. S. 1 (R. 8-9). This suit is based on an amended claim for refund filed on April 10, 1939. This claim was filed after the Commissioner had rejected a claim filed on June 29, 1935, and another claim filed on June 30, 1937, the rejections being based on the ground that taxpayer had failed to submit evidence as to whether it bore the burden of the tax. (R. 9-11.) The amended claim of April 10, 1939, was accompanied by a seven-page letter signed by a certified public accountant. The letter was attached to the claim as a part of

it, and was expressly included in and under the signature and oath of taxpayer by its president who signed and verified the claim. The Commissioner associated that statement and computation with the amended claim, considered and treated the document as a part thereof throughout, and it will hereinafter be referred to as a part of the claim. (R. 11.)

The accountant's letter, above referred to, set forth a schedule, purporting to be based on net sales and gross profits taken from the taxpayer's books and records, and showing average margin computations over certain periods of time. It showed, among other things, that the average margin before the tax period was 19.25%, during the tax period 22.46%, and following the tax period 18.67%. It was stated further that this ^{margin} ~~maximum~~ increase during the tax period was in part due to an increase in unit sales prices which started early in June 1933 and continued in an upward trend until the later part of the year. (R. 11-12.)

After receipt of the claim of April 10, 1939, the Commissioner advised the taxpayer that the marginal data submitted in support of the claim did not afford a sufficient basis for him to determine whether and to what extent the burden of the floor stocks tax was borne by the taxpayer, and requested that additional evidence be submitted, including, among other things, a statement showing the prices charged before and after

the effective date of the tax, a detailed explanation of the method used in recording new merchandise, and a detailed explanation as to the manner in which supervision was maintained over departmental inventories (R. 13).

No evidence was submitted to the Commissioner in accordance with this request and no evidence in addition to that included in the refund claim of April 10, 1939, was ever submitted to the Commissioner by the taxpayer. The claim for refund was finally rejected by the Commissioner on September 15, 1939, and this suit was instituted in the Court of Claims on September 11, 1941. (R. 1, 13-15.)

After the filing of the petition herein, taxpayer sought to prove its claim for the refund of the floor stocks tax from its books, records, audit schedules, invoices, and other data showing the prices prevailing both before and after August 1, 1933, and by the testimony of witnesses. Except to the extent shown in the claim for refund filed on April 10, 1939, none of this evidence was ever presented or offered to the Commissioner when he was considering the claim for refund and at which time it either was available or could as readily have been obtained and submitted as after this suit was filed. (R. 15.)

On April 22, 1944, the Government filed a plea in bar upon the ground that the taxpayer had no right of action against the United States because

no evidence was ever submitted in support of any claim for refund as expressly required by the applicable provisions of Section 903 of the Revenue Act of 1936 (R. 3-4).

The Court of Claims sustained the Government's plea in bar and dismissed the petition (R. 25).

ARGUMENT

The holding of the court below, that the data submitted with taxpayer's claim for refund did not meet the requirements of the statute (Sec. 903, Revenue Act of 1936, Appendix, *infra*, p 12) and the regulations (Art. 202, Treasury Regulations 96, Appendix, *infra*, p. 14), is correct and in accordance with the decisions of this Court and of a number of Circuit Courts of Appeals. Since the taxpayer did not submit evidence to enable the Commissioner of Internal Revenue to determine the question of whether it bore the burden of the tax, it is not entitled to any recovery in a suit brought in court. The recent decision of this Court in the case of *Angelus Milling Co. v. Commissioner*, 325 U. S. 293, plainly indicates that a failure to comply with requirements of the applicable statutes and regulations governing claims for refund deprives a court of jurisdiction over a suit brought after the claim is denied. Other decisions dealing with the statute and regulations herein involved and to the same effect are *Weiss v. United States*, 135 F. 2d 889

(C. C. A. 7th), *Jaubert Bros. v. United States*, 141 F. 2d 206 (C. C. A. 5th), and *Cudahy Packing Company v. United States*, 152 F. 2d 831 (C. C. A. 7th), pending on petition for certiorari, No. 1114; this Term. In the *Weiss* case, the court stated that the Commissioner must be afforded an opportunity to pass upon the merits of a claim for refund of compensating taxes as a prerequisite to the claimant's right to a court hearing, and sustained the dismissal of the action.¹ See also *Samara v. United States*, 129 F. 2d 594 (C. C. A. 2d), certiorari denied, 317 U. S. 686; and *Louis F. Hall & Co. v. United States*, 148 F. 2d 274 (C. C. A. 2d), certiorari denied, No. 167, this Term, in which the same result was reached although the court did not dismiss the complaint for lack of jurisdiction but, rather, thought that it should be dismissed on the merits or that a motion for summary judgment for the Government should be granted. Under the *Angelus* decision, the plea in bar was properly sustained in the instant case; and the *Samara* and *Hall* decisions do not aid the taxpayer.

This is not a case in which the claimant was denied the right to establish, in a court proceeding, the fact that it had borne the burden of the

¹ In this connection, petitioner, in relying on the provisions of Section 902, Revenue Act of 1936 (Appendix *infra*, pp. 11-12), as requiring that proof that it bore the burden of the tax must satisfy either the Commissioner or the court, overlooks the provision of Section 903, requiring the filing of a claim and the setting forth of evidence relied upon under oath as a prerequisite to bringing suit under Section 902.

tax because it had failed to establish this fact to the satisfaction of the Commissioner. It is, rather, a case in which the original claim was defective in that it did not contain any substantial supporting evidence. The Government's plea in bar specifically stated that the petitioner had no right of action because no evidence was submitted in support of its claim (R. 3-4), and the gist of the opinion of the court below is that since no adequate claim was filed with the Commissioner, the suit cannot be maintained. The claim, together with the attached statement which was treated throughout as a part of the claim (R. 11),² afforded to the Commissioner no opportunity whatever to exercise the administrative judgment Congress plainly contemplated (R. 23). For this reason, the claim was fatally defective.

The decision below, therefore, is not in conflict with the decisions of this Court in *United States v. Jefferson Electric Co.*, 291 U. S. 386; and *Anniston Mfg. Co. v. Davis*, 301 U. S. 337. This Court, in the *Jefferson Electric Co.* case, ex-

² The only thing even in the nature of evidence ever submitted to the Commissioner by the taxpayer was a statement purporting to be based on petitioner's records and showing certain marginal computations (R. 11). Petitioner did not at any time furnish a statement of comparative selling prices as expressly requested by the Commissioner and did not explain its failure to do so (R. 10, 14). Margin computations give rise to no presumption in the case of floor stocks taxes (cf. Section 907, 7 U. S. C. 649, with respect to processing taxes) and, as the court below held, no real evidence was submitted.

pressly recognized the necessity of a preliminary appeal to the Commissioner and the presentation of a proper claim for refund. 291 U. S. at 398. It pointed out that the right to a refund of taxes was limited by the requirement that the taxpayer show that it had borne the burden of the tax, whether the proceeding was before the Commissioner or in a suit (p. 395) "brought after an application to him has been unavailing." The decision of the court below is clearly in accord with that holding.

There is no conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Bethlehem Baking Co. v. United States*, 129 F. 2d 490. In that case, the taxpayer submitted substantial evidence to the Commissioner and the court expressly stated (p. 493) that it was "the duty of a claimant to present a formal claim and to endeavor by sufficient proof to satisfy the Commissioner as to its merit," but that after he had done so he was not barred from presenting other evidence in court. The decision of the court below is, in fact, clearly in accord with the decision in the *Bethlehem Baking* case.³

³ Cf. R. 24, where the court states that if the Commissioner had rejected the claim because it had not been established to his satisfaction that plaintiff was entitled to a refund—

plaintiff would not be barred here from submitting the same and further additional evidence * * * to establish to the satisfaction of the court the allegations of the claim and its right under the statute to the refund.

CONCLUSION

The court below concluded, upon the record in this case, that the petitioner, having failed and refused to submit any evidence to the Commissioner in support of its claim for refund, was barred from submitting in court the evidence which was available and which could and should as readily have been offered to the Commissioner. This decision is correct, there is no conflict of decisions, and no other basis for certiorari. The petition should be denied.

Respectfully submitted,

J. HOWARD McGRATH,
Solicitor General.

SEWALL KEY,
Acting Assistant Attorney General.

HELEN R. CARLOSS,

ELIZABETH B. DAVIS,

Special Assistants to the Attorney General.

MAY 1946.

APPENDIX

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended:

SEC. 9 (a). To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as herein-after provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * *
(7 U. S. C. 609.)

SEC. 16 (a). Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed

if the processing had occurred on such date. * * *

(7 U. S. C. 616.)

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be

reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

(7 U. S. C. 644.)

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C. 645.)

SEC. 904. STATUTE OF LIMITATIONS.

Notwithstanding any other provision of law, no suit or proceeding, whether brought

before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought. (7 U. S. C. 646.)

SEC. 916. RULES AND REGULATIONS.

The Commissioner shall, with the approval of the Secretary, prescribe such rules and regulations as may be deemed necessary to carry out the provisions of this title. (7 U. S. C. 658.)

Revenue Act of 1939, c. 247, 53 Stat. 862:

SEC. 405. FILING OF CLAIMS FOR REFUND OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Section 903 of the Revenue Act of 1936 (relating to expiration of time for filing claims for refund of amounts paid under the Agricultural Adjustment Act) is amended by striking out "July 1, 1937" and

inserting in lieu thereof "January 1, 1940."
(7 U. S. C. 645.)

Treasury Regulations 96, promulgated under
Title VII of the Revenue Act of 1936:

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

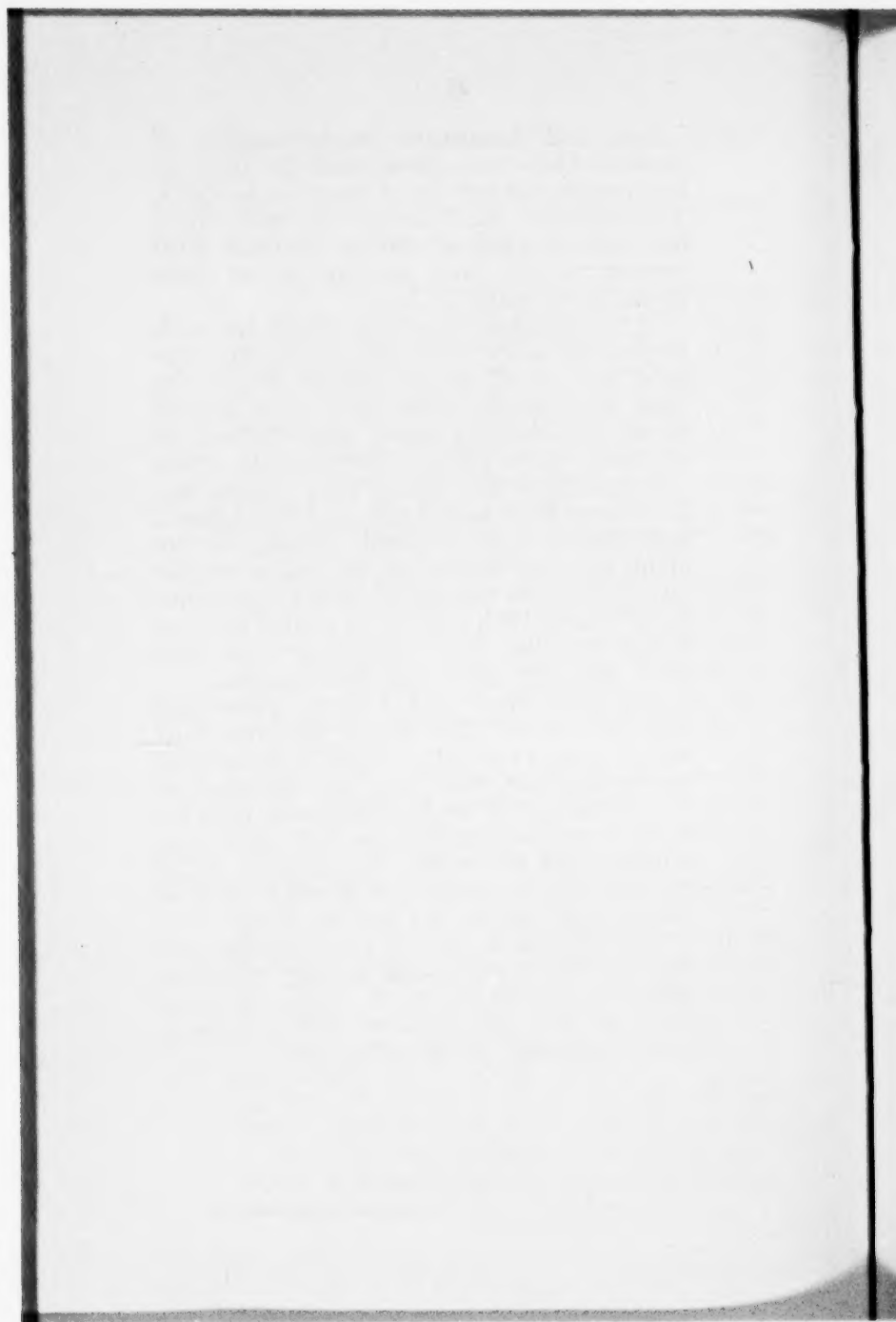
The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable.*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

ART. 302. *Limitation as to number of claims.*—Only one claim shall be filed by any person for refund of floor stocks taxes. The claimant shall include in such claim the total amount of refund claimed with respect to the total amount of all floor stocks taxes paid by him.

If the claimant paid floor stocks tax with respect to more than one commodity, the total amount of refund claimed out of the total floor stocks taxes paid with respect to all commodities shall, nevertheless, be set forth in one claim. For example, if the claimant paid the cotton floor stocks tax, the wheat floor stocks tax, and the tobacco floor stocks tax, he shall include in one claim the total amount of the refund sought out of the total amount of floor stocks taxes paid by him with respect to cotton articles, wheat articles, and tobacco articles, and shall not file three separate claims.

ART. 305. *Facts and evidence respecting tax burden.*—If the claim involves floor stocks taxes paid with respect to more than one commodity, the facts and evidence as to the amount of tax burden borne with respect to articles made from each such commodity shall be set out separately; e. g., if the claim is for refund of amounts paid as cotton floor stocks tax and as wheat floor stocks tax, the facts and evidence concerning the tax burden with respect to cotton articles shall be set forth separately from the like facts and evidence with respect to wheat articles. (See article 202.)



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MAY 23 1946

CHARLES ELMORE DROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 981

A. B. FRANK COMPANY,

Petitioner,

vs.

THE UNITED STATES

REPLY BRIEF FOR PETITIONER

THEODORE B. BENSON,

Counsel for Petitioner.

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BY

JOHN BURNET

OF THE UNIVERSITY OF OXFORD

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THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

On page 7 of his brief in opposition the Solicitor General apparently questions the adequacy of the claim for refund. He says, "the claim was fatally defective," and for that reason there is no conflict with the decisions of this Court in *United States v. Jefferson Electric Co.*, 291 U. S. 386, and *Anniston Manufacturing Company v. Davis*, 301 U. S. 337.

The petitioner is gratified to know that the *Jefferson Electric Company* and the *Anniston Manufacturing Company* cases are distinguishable for no other reason.

The claim for refund is, however, not "fatally defective" and the Solicitor General himself does not so contend in his statement of the question presented on page 2 of his brief. There, as in the plea in bar filed by the United States, he states the question as the right to sue, and he states, as

the premise of the question, the instance in which, "a taxpayer filed a claim for refund."

The question here is not the sufficiency of the claim for refund, but the right to sue and submit evidence, or, as stated in the *Anniston Manufacturing Company* case, the right to a hearing, which implies the privilege of introducing evidence. The *Jefferson Electric Company* and the *Anniston Manufacturing Company* cases are not distinguishable for any reason.

THEODORE B. BENSON,
Counsel for the Petitioner.

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